U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A28 586 488 - Dallas

Date:

MAY 17 1996

In re: CHRISTIAN CHUKWUEMEKA OGU

IN DEPORTATION PROCEEDINGS

INDEX

APPEAL

ON BEHALF OF RESPONDENT: David Swaim, Esquire
Tidwell Swaim & Associates, P.C.
12222 Merit Drive, Suite 1450
Dallas, Texas 75251-2275

ON BEHALF OF SERVICE: James T. Reynolds
District Counsel

CHARGE:

Order: Sec. 241(a)(1)(D)(i), I&N Act [8 U.S.C. § 1251(a)(1)(D)(i)] - Conditional resident status terminated

APPLICATION: Waiver under section 216(c)(4); voluntary departure

The respondent appeals from the June 3, 1993, order of an Immigration Judge finding him deportable as charged and denying his application for a waiver under section 216(c)(4) of the Immigration and Nationality Act, 8 U.S.C. § 1186a(c)(4). The appeal will be dismissed.

During the pendency of this appeal, the respondent has filed a motion to remand the record for consideration of an application for adjustment of status under section 245 of the Act, 8 U.S.C. § 1255. The motion will be granted.

The appeal

With regard to the respondent's appeal, we have reviewed the record of proceedings, the immigration judge's decision, and the respondent's contentions on appeal. To the extent that the Immigration Judge found that the respondent failed to meet his burden of proving that his marriage was bona fide so as to qualify for a waiver under section 216(c)(4) of the Act, we affirm the decision based upon the reasons set forth in that decision. See generally, Matter of Mendes, 20 I&N Dec. 833 (BIA 1994); Matter of Balsillie, 20 I&N Dec. 486 (BIA 1992); Matter of Lemhammad, 20 I&N Dec. 316 (BIA 1991).

In affirming the Immigration Judge's denial of the section 216(c)(4)(B) waiver, however, we do so without affirming the Immigration Judge's finding that the waiver should be denied because the respondent was "at fault" in failing to file a joint petition with his former spouse. The Immigration Judge's construction of the section 216(c)(4) waiver appears to effectively require an alien spouse to demonstrate that he was "not at fault" in the termination of the marriage. We consider such a construction to result in a requirement very similar to that which Congress expressly deleted from the waiver in the 1990 amendments to section 216, namely that the alien demonstrate that he terminated the marriage "for good cause." As such, we find the construction to be inconsistent with the history of the section of law in question and we accordingly reject it. We further note that as we have already affirmed the finding that the respondent did not meet his substantive burden of proof with regard to the waiver, we need not further consider the application of the "not at fault" requirement of section 216(c)(4)(B) in this case.

We note that during the pendency of this appeal, the respondent's former wife submitted a letter in support of the respondent's waiver application. Our review is a review on the record. See Matter of Haim, 19 I&N Dec. 641 (BIA 1988). Hence, we do not consider new evidence submitted on appeal except insofar as is necessary to determine whether a motion to reopen is to be granted. Here, the unsworn letter does not meet the requirements for a motion to reopen, and we have not considered the letter in our adjudication of this appeal.

Accordingly, the appeal will be dismissed.

The motion

The respondent moves to remand this case to the Immigration Judge to provide the opportunity to apply for adjustment of status under the provisions of section 245 Act. In support of his motion, the respondent has supplied a copy of the Notice of Approval of a visa petition filed on his behalf by his employer, as well as an application for adjustment of status. Our review of the visa priority dates indicates that the respondent is presently eligible for adjustment of status to lawful permanent residence. In view of this fact, and notwithstanding the opposition of the Immigration and Naturalization Service, which we address below, we find that remand is appropriate in this instance. See Matter of Garcia, 16 I&N Dec. 653 (BIA 1978).

The Service opposes reopening on the ground that reopening is not warranted in the exercise of discretion. We note in this regard that the Immigration Judge did not find that the respondent

had entered into a sham marriage, instead merely finding that the respondent failed to meet his burden of proof with regard to the waiver under section 216(c)(4)(B). We further note that the Immigration Judge granted the respondent the privilege of voluntary departure under section 244(e) of the Act, which the Service did not appeal. Upon our review of the record, we find that reopening is warranted in the exercise of discretion. The Immigration Judge will, of course, still adjudicate the request for relief in the exercise of discretion upon consideration of all of the evidence presented at the reopened hearing.

In its opposition to the motion, the Service has pointed out that an alien holding conditional permanent resident status is prohibited by section 245(d) of the Act from adjusting his status under section 245(a). See Matter of Stockwell, 20 I&N Dec 309 (BIA 1991). However, section 245(d) of the Act does not prohibit an alien whose conditional permanent resident status has been terminated from adjusting his status under section 245(a). Id. Accordingly, as we have affirmed the denial of the respondent's waiver request and thereby affirmed the termination of the respondent's conditional permanent resident status, he is no longer barred from adjustment of status under section 245(a).

Accordingly, the following orders will be entered.

ORDER: The appeal is dismissed.

FURTHER ORDER: The motion is granted and the record is remanded to the Immigration Judge for further proceedings and entry of a new decision.

FOR THE BOARD

55G

WPPINDEX 307

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
DALLAS, TEXAS

File No.: A 28 586 488 JUNE 3, 1993

In the Matter of	)	
	)	
CHRISTIAN CHUKWUEMEKA OGU	)	IN DEPORTATION PROCEEDINGS
	)	
Respondent	)	

CHARGE: Deportable under Section 241(a)(1)(D)(I) as a conditional resident whose status was terminated.

APPLICATIONS: Waiver under Section 216 of the Act; voluntary departure under Section 244(e).

ON BEHALF OF RESPONDENT:	ON BEHALF OF SERVICE:
Sarah Brown Texas Bar	James Reynolds INS District Counsel Dallas, Texas

ORAL DECISION OF THE IMMIGRATION JUDGE

Christian Chukwuemeka Ogu entered the United States as a student in September of 1982. He was then and is now an alien and a native and citizen of Nigeria. In June of 1989 his status was adjusted to that of a non-immigrant student to lawful, permanent resident on a conditional basis by virtue of marriage to an American citizen, Shannon Renee Hooper. On August 13, 1992, the respondent filed an application for a waiver of the requirement that he file a joint petition to remove the condition imposed on his residence status basing his claim on allegations that he married Shannon Renee Hooper in good faith. On December 21, 1992,

the waiver application was denied as the Service believes that the evidence that he submitted was insufficient to support his application and his residence status was terminated. An Order to Show Cause was issued on the date that his status was terminated, February 9th, 1993. The respondent subsequently acknowledge that the allegations in the Order to Show Cause were true and he admitted being deportable for the reasons shown in the Order to Show Cause, and he indicated an intent to pursue the waiver before an Immigration Judge. And he also considered filing a suspension application. And he orally requested voluntary departure as an alternative form of relief. The respondent never did file a suspension application but the case went forward on the request for a wavier under Section 216 of the Act.

A hearing was conducted on the question of relief only on June 3, 1993. At that time I considered five sets of documents to be in evidence. These were numbered one through five. The Order to Show Cause was Exhibit 1. Exhibit 2 consisted of an I-213 and a notice of termination. Exhibit 3 and 4 were packets of documents submitted by the respondent. Exhibit 3 contains 15 documents which are indexed. And Exhibit 4 contains 7 documents which are indexed. The Service submitted Exhibit 5, 34 pages of material which are in many instances redundant, but they include some that were not included with the materials submitted by the Service. These include a letter from Shannon Hooper who testified, another copy of the termination notification, the divorce decree, and her original

petition for the divorce, IRS 1040's for 1989 and '90, INS Forms I-751, I-181, I-485, and I-130, and there's a lease on property in Houston at 5900 Elm Street, and the couple's marriage license. In addition to the documents, three witnesses testified. These included the respondent, his ex-wife, Shannon Hooper, and the INS examiner, Miss Norma Edmiston.

Briefly restated Mr. Ogu indicates that he came to the United States for the purpose of studying pharmacy. He did get an undergraduate degree in pharmacy and also post-graduate degree. He now possesses a Ph. D. in that science. He claimed that he met Shannon Hooper in the spring of 1983 when they were students together studying pharmacy. He claimed that she asked him for assistance with a course that was causing her some difficulty. They studied together, courted over a long period of time, finally married in June of 1988. He said they did not live together prior to their marriage but immediately after marrying moved together into the same apartment on Elm Street in Houston. He claimed that she lived there with him for fourteen months and they separated, in fact, in August of 1989. He said he moved to Dallas in September looking for work as a clinical pharmacist. He said because of his advanced degrees it's difficult to find work as a pharmacist. He said that in many instances he's regarded as overqualified for some pharmaceutical employment. He indicated that he also worked in Virginia for awhile and came back hoping to reconcile with his wife. He said that he stayed in Houston and then came back to

Dallas looking for more work. Finally, he got work with the Baylor Medical Center in Dallas, for whom he is presently employed. He said his wife knew about his various job hunting expeditions and efforts and he felt that she supported him in some of these, but he said she would not move with him to other places where he was finding work because she was overly attached to her parents. He said he didn't have any advance warning that she was going to divorce him. He said that they visited in March of 1990 in Virginia and he left there in July of 1990, coming back to Texas after that.

He acknowledged that concerning tax returns in evidence that he submitted those to the Internal Revenue Service without her signature. He said he signed the blank which contains her name in cursive form, but he claimed that she knew he was going to do that and consented to it.

He indicated that he is thirty years of age, has no children, never been married before, regards himself as a person in good health, he's not a veteran. He said he did not cause his spouse to pay any of his debts. He denied telling her that he would not "sign for the divorce" unless she went along with his efforts to get his residence status. He said he never used any aliases or variations of his name. He claimed that his parents are in Nigeria along with most of his ten siblings. He said two of the ten are here in the United States being himself and his brother. His brother is also a pharmacist.

The respondent said that he presently lives alone, that he has a passport, he's never been arrested, he doesn't own any property, that he pays rent on a place he lives, he said he didn't have business interest which I took to mean that he did not claim to have any ownership interests in any business, but he's claimed that he persistently worked in highly skilled medical facilities since he became a pharmacist, and apparently during internships as a student. He claimed that he could have gotten a visa on the basis of his job skills without resort to marriage for that purpose. He claimed that he married Shannon Hooper because he loved her and he said he still loves her.

Shannon Hooper, the respondent's ex-wife testified that they knew each other from 1984 onward and studied together as classmates in college. She said that their relationship related almost exclusively to school. She said that they didn't have much of a social life together off campus although he had some contact with her parents before they married. She said that both her parents opposed the idea of her marrying the respondent but she married him nevertheless in a civil ceremony which her parents did not attend. She said they lived together until August of 1989. She filed for divorce in November after they separated in August of 1989.

She stated unequivocally she filed for divorce because she believed that the respondent had not entered into the marriage in good faith. She cited several reasons for coming to that conclusion. She said that he never did give her a wedding ring,

never introduced her to his parents. She said that he didn't recognize her contributions to his activities such as paying for publication of his thesis, when as she put it he recognized everybody else in the dedication of the thesis. She said there was no honeymoon. She said that he used money that she took out of the bank to provide to him for educational purposes and he never repaid her for that. She said that she was required to pay numerous bills on his behalf. She said that she had to do that even though he was getting money from the school and she was paying for most of his expenses even after he started to work. As she put it "she lost a tremendous amount of money" in this relationship. Concerning the divorce she said that he was uncooperative relative to that forcing her to amend the petition for divorce, and finally he defaulted and she obtained the divorce.

Shannon Hooper said she was not aware that he was filing the Internal Revenue Service forms over her signature. She said that he did not accurately report income and as a result she was assessed with a deficiency which she had to pay without assistance from him. She said that, in contrast to his testimony, that she generally had good grades in school, although she acknowledges that she needed help on a particular class and that he did help her with that.

She said that he tried to tell her what to say in this testimony for these proceedings. She said that she visited him in Virginia hoping that they would reconcile.

She claims that she presently lives with her parents and continues to be employed as a pharmacist for the Eckard Pharmaceutical Company.

She said she's not bitter although she said she felt that he had taken advantage of her solely for the purpose of getting the Immigration benefits that are the subject of this litigation. She acknowledges that she wrote the letter, which is the first page of Exhibit 5.

Norma Edmiston testified that she was the examiner who dealt with the respondent when he was being interviewed and she interviewed him twice. She identified the documents that were submitted by the Service. After two interviews with the respondent she believed that he had failed to convince her that they actually lived together in a bona fide marital relationship. She identified documents that were introduced to the Service incidental to the applications for the waiver. In contrast to his testimony that she shouted at him, caused him to cry, she doesn't recall him crying and she denied that she shouted at him. She could recall that he appeared alone for both interviews and that the first interview he told her that he had signed all the tax returns and finally at the second interview he acknowledged that he was the party who signed for his wife on the IRS forms.

A chronology would probably be helpful and relative to this. These are the dates which I consider to be significant. The respondent was born on August 2, 1962, in Abatete, Nigeria. The

respondent entered the United States on September 5, 1982, as a student. The respondent married Shannon Hooper on June 13, 1988. The Immigration Service adjusted the respondent's non-immigrant status to that of a conditional, permanent resident on June 26, 1989. In August of 1989, the respondent and his citizen wife separated. On November 9, 1989, Shannon Hooper filed for divorce. In March, 1991, the divorce petition was amended by Shannon Hooper. On August 13, 1992, the respondent filed his application for a wavier of the requirement concerning filing of a joint petition to remove the condition on his status. On December 21, 1992, the Service denied the wavier and on February 9, 1993, the conditional resident status was terminated.

It is clear that the respondent failed to submit a joint petition that would ordinarily be required for removal of the condition on his status within the time limits that would be applicable to this case. There is some evidence to the effect that he sent material to a southern regional service center back in January of 1992. He claims it was lost. But even that document, if it was a I-751 application, it would have been late. The only known application is the one dated August 13, 1992, which was even later still. Thus, under Section 216 the sole avenue of relief available, relative to the marriage is the waiver under Section 216(c)(4)(B). In that statute the Congress has provided that a discretionary waiver can be extended to a conditional resident if he or she establishes that the qualifying marriage was entered into

in good faith by the alien's spouse, and that the qualifying marriage has been terminated other than through death of the spouse, and that the alien was not at fault in failing to meet the requirements of paragraph 1 of Section 216(c), which relates to filing of a petition within a prescribed time period.

The evidence here clearly is contradictory. Much of the documentary evidence supports the respondent's contention that after a long courtship the respondent and Shannon Hooper entered into a bona fide marriage for the reasons that traditionally cause young people to marry and he claims that the marriage broke up when he elected to take employment outside of Houston and she did not want to leave Houston.

The contradictory evidence comes from the respondent's wife who asserts very clearly her opinion that the marriage was solely for Immigration purposes even though they lived together for something on the order of fourteen months. I think it's clear that she is saying that although the marriage may have looked like a bona fide marriage outwardly because of what was going on inside the marriage she concluded that it was not a good faith marriage.

It's suggested that the long courtship is significant and reflects serious consideration of the consequences of marriage and that it supports the idea that this was a bona fide marriage. Concerning whether or not it was a bona fide marriage or not, I think it is clear the parties understand that if the parties intended a bona fide marriage at the outset, even if the marriage

did not last very long, the marriage might serve as a legitimate basis for Immigration benefits. It's also clear that the existence of a de jure marriage does not mandate the grant of Immigration benefits. More has to be established and if a marriage is viewed as one entered into solely for Immigration purposes, then although it may otherwise be legitimate it will be treated as one that's not adequate to serve as a basis for a grant of Immigration benefits. The Totality of the circumstances ~~are~~ is considered to be important and bears on the issue of whether or not there was a good faith relationship. And if the alien had some ulterior motive in marriage. My view of the long courtship is that it might be something that, as suggested by respondent and counsel, reflects serious consideration of the marriage and thus would point to legitimacy of the marriage in the Immigration sense. At the same time, the long courtship might actually be suggestive that the position taken by the wife is the more accurate view of what happened. I think it's evident by looking at the chronology of events that I've mentioned previously that these parties married after they got out of school and when he would have otherwise have had to leave the United States. They separated within two or three months of the time that his status was adjusted. Clearly, the adjustment took place on June 26 and all we know at this point is that they separated sometime in August. So it's not much more than sixty days, if it was sixty days after the adjustment that they separated. In fact, that would suggest that the marriage might not

have been bona fide. Furthermore, the delay in getting the divorce which he contributed to is also suggestive that he was trying to keep the de jure marriage together long enough to get benefits. The fact that there was no ring, no honeymoon, that he didn't support her also support Miss Hooper's contention that she was being taken advantage of and that this was not a good faith marriage, instead it was one entered into solely for Immigration benefits for the respondent.

As I perceive the act, the burden of proof is on the respondent to establish all elements of fact necessary to serve as a basis for the waiver that he's requesting.

I think the totality of the circumstances are such that there may have been a qualifying marriage. At the same time I don't think that the evidence supporting that is very strong. I think that as far as the statute itself is concerned the most critical question is whether or not the respondent was at fault in failing to meet the requirements that there be a timely filed joint petition. My conclusion after listening to all the testimony is that he was at fault in failing to meet the requirements of paragraph one. It seems quite evident that after she filed the divorce in November of 1989, he could have waived service and quickly obtained the divorce. Thus, putting himself into a posture where he could have applied for the waiver in a timely fashion without the need for a joint petition. It is further clear that the divorce didn't occur until August of 1991. He could have gone

the waiver route in a timely fashion at that point. I think that given the way he treated his wife, and the manner in which the relationship between them deteriorated he is partially at fault for her refusal to join with him in filing a joint petition. I think the circumstances are such that the evidence would not support a holding that the respondent was not at fault in failing to meet the requirements of paragraph one of Section 216(c). Being of that view, it's not necessary consider whether or not relief should be granted as a matter of discretion. I recognize that the Service has suggested that it should be denied as a matter of discretion. Concerning that I note that the purpose for the respondent coming to the United States has been fully fulfilled. He has acquired a highly significant education. He has obtained skills that he came to get. He has a degree that would enable him to function as a pharmacist anywhere. He has skills that he came to get. He does not appear to be a person who has done much to help others, if any. He doesn't have any property or ownership interests in the United States. He does not have much in the way of strong equities in his favor. Given the fact that he has achieved the educational goals that he came to get, it does not appear to be unfair in any sense to demand that he leave the United States at this time.

Unless I'm in error about the testimony, I don't believe he addressed the issue of voluntary departure. In view of the fact that he has not indicated in evidence a willingness to depart the United States at his own expense. In view of the lack of evidence

on the subject, it is my view that the application for voluntary departure would have to be denied.

For the reasons which I've stated the order in this case would be that Christian Chukwuemeka Ogu be deported from the United States to Nigeria for the reason shown in the Order to Show Cause.

Upon reconsideration of the issue of voluntary departure and having heard additional testimony from the respondent who indicated that he would be willing to depart the United States promptly at his own expense to avoid the adverse consequences of being deported, I will modify my previous order as follows. It is ordered that Christian Chukwuemeka Ogu be allowed to voluntarily depart the United States on or before July 5, 1993, or to such extension of that date as may be granted by District Director. It is further ordered that if the respondent fails to make a timely departure and without further notice of hearing, he should be deported from the United States to Nigeria for the reason shown in the Order to Show Cause.

Edwin R. Hughes

EDWIN R. HUGHES
Immigration Judge